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IN THE

Supreme Court of the United States

October Term, 1965

No. 308

LESTER G. MADDOX,

Appellant,

—v.—

GEORGE F. WILLIS, JR., *et al.*,

Appellees.

MOTION TO AFFIRM OR DISMISS

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MOTION TO AFFIRM OR DISMISS

Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the appeal be dismissed on the grounds that it is not within the jurisdiction of this Court, or, in the alternative, that the final judgment and decree of the District Court be affirmed on the ground that the question is so unsubstantial as not to warrant further argument.

Opinion Below

The final judgment of civil contempt was entered on February 5, 1965, but is not yet officially reported. It, and a copy of the court's findings of fact, conclusions of law, and order of civil contempt appear in appellant's jurisdictional statement (App. pp. 14-25). Prior opinions herein are reported in *Willis* v. *Pickrick Restaurant,* 231 F. Supp. 396 (N. D. Ga. 1964), stay denied, 379 U. S. 241 and *Willis* v. *Pickrick Restaurant,* 234 F. Supp. 179 (N. D. Ga. 1964).

Questions Presented

1. Whether a final judgment of contempt ordered by a one-judge United States District Court may be directly appealed to the Supreme Court of the United States?

2. Whether a restaurant which affects commerce within the meaning of Title II Section 201(b)(2), and (c) of the Civil Rights Act of 1964 must serve members of the public without regard to race?

Statement of the Case

The United States District Court for the Northern District of Georgia, Atlanta Division, with a single judge sitting, entered a final judgment of contempt against the appellant on February 5, 1965, for having violated a permanent injunction entered by the then dissolved[1] three-judge court on September 4, 1964. The permanent injunction ordered the appellant to cease refusing service in his restaurant to Negro persons solely on account of their race.

The appellant never appealed from the final judgment of the three-judge district court. Prior thereto, July 28, 1964, however the appellant had filed notice of appeal from a temporary injunction issued in this case on July 23, 1964, to the Supreme Court of the United States. No Jurisdictional Statement was filed and the appeal was abandoned.

August 11 and 13, 1964, Negro plaintiffs made unsuccessful attempts to eat at the Pickrick, which was a corporation

[1] The three-judge court ordered itself dissolved on September 4, 1964, after finding no statutory authority for convening such a court to hear civil contempt proceedings ancillary to suits prosecuted under the Civil Rights Act of 1964. Further proceedings relating to the civil contempt were therefore ordered to be heard by the district court sitting with one judge.

and were informed by the appellant that the restaurant was closed as it later was. Subsequently, September 26, 1964, on part of the premises formerly occupied by the Pickrick the appellant opened the Lester Maddox Cafeteria, owned by appellant alone. This change in method of operation was made with the intent and purpose of evading the injunctive orders of the court (R. 512). The following sign was posted in and about the Lester Maddox Cafeteria:

> Notice: I do not offer to serve either (1st) integrationists, nor (2) interstate travelers, regardless of race, color, creed or national origin. A person entering this restaurant for service will be considered as representing to me that such person is neither an integrationist nor an interstate traveler. If such representation is believed to be false, service will be refused. Lester Maddox, Owner, Lester Maddox Cafeteria.

September 26, 1964, and January 28 and 29, 1965, Negro plaintiffs attempted to enter the Lester Maddox Cafeteria for the purpose of eating and were excluded because of race (R. 519). The appellant in the course of refusing service, also assaulted them (Tr. of Feb. 1, 1965, 53, 54, 55).

Thereafter, on motion of the plaintiffs and the Attorney General of the United States, the appellant was ordered to show cause why he should not be held in civil contempt.

After a three-day hearing Judge Hooper found the appellant in contempt and set a penalty of $200.00 for each day of any future violations.

Reasons for Dismissal

This appeal is not within the jurisdiction of the United States Supreme Court. 28 U. S. C. §1253, P. L. 88-352 §206(b).

Under Title II, §206 of the Civil Rights Act of 1964, direct appeals to this Court are limited to those from three-judge courts. Section 206 must be read in the light of prior statutes governing three-judge courts. See, *Katzenbach* v. *McClung*, 379 U. S. 294, where §1253 is cited as supporting a direct appeal of a case under the Act, and *Atlanta Motel* v. *United States*, 379 U. S. 241, where §2282 is cited as supporting the empaneling of a three-judge court. Therefore, whether or not a three-judge court empaneled under §206 is to continue to sit is governed by decisions interpreting the statutes controlling the three-judge court. Under these decisions a three-judge court does not sit to resolve proceedings ancillary to the main action.[2] Therefore, the dissolution of the three-judge court which issued the original injunction was proper. A single judge was authorized to issue the order of contempt from which appellant now seeks to take an appeal.

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[2] Under the authority of *Bailey* v. *Patterson*, 369 U. S. 31, the three-judge requirement is to be narrowly construed, the three-judge court is not required where no substantial constitutional question is presented, and where such a special court is not required, the case cannot be directly appealed to the Supreme Court under §1253, even if a three-judge court is actually convened and hears the case. In *Turner* v. *Memphis*, 369 U. S. 350, the existence of fictitious claims eliminated the necessity of the three-judge panel. *Kesler* v. *Dept. of Public Safety*, 369 U. S. 153, declares that the three-judge court is a technical device to be construed strictly. In *Allen* v. *Prince Edward County*, 249 F. 2d 462 (4th Cir. 1957), cert. den. 355 U. S. 953 (1957), the three-judge panel was, as in this *Maddox* situation, dissolved before the proceedings in controversy were before the court. The court there held in effect that proceedings ancillary to those requiring a three-judge court do not require such a court.

Appeals to this court are governed solely by statute and such appeals from a district court, sitting with a single judge are extremely limited and confined to:

1. A one-judge district court holding a federal statute unconstitutional (28 U. S. C. 1252);

2. Criminal cases, where a one-judge court has entered one of certain types of judgments adverse to the United States (Criminal Appeals Act, as amended 18 U. S. C. 3731);

3. Where the United States brings a civil action to enforce antitrust laws, the Interstate Commerce Act, or Title II of the Federal Communications Act (15 U. S. C. §29 and 49 U. S. C. §45, as amended by §17 of the Act of June 25, 1948, 62 Stat. 989; and 47 U. S. C. §401(d)) and a one-judge or three-judge court has entered judgment.

Obviously, this is not one of the above special situations. The case is therefore not appealable on its merits directly to the Supreme Court. In *Stratton* v. *St. Louis Southwestern*, 282 U. S. 10, at 15-16, the following language is used:

> If a single judge, thus acting without jurisdiction, undertakes to enter an order granting an interlocutory injunction or a final decree, either dismissing the bill on the merits or granting a permanent injunction, no appeal lies from such an order or decree to this court, as the statute plainly contemplates such a direct appeal only in the case of an order or decree entered by a court composed of three judges in accordance with the statutory requirement.

Reasons for Affirming

Assuming *arguendo* that this Court does have jurisdiction, the District Court's final judgment of contempt should be affirmed.

The record is clear that the appellant violated the terms of the injunction by refusing to serve Negroes because of their race. *Katzenbach* v. *McClung,* 379 U. S. 294 makes it equally clear that he was obliged to serve them. *McClung* held that §201(a)(b)(c) of the Civil Rights Act of 1964 forbidding racial discrimination by restaurants offering to serve interstate travelers or serving food a substantial portion of which has moved in interstate commerce is a constitutional exercise of the commerce power:

> The power of Congress in this field is broad and sweeping; where it keeps within its sphere and violates no express constitutional limitation it has been the rule of this Court, going back almost to the founding days of the Republic, not to interfere. The Civil Rights Act of 1964, as here applied, we find to be plainly appropriate in the resolution of what Congress found to be a national commercial problem of the first magnitude. We find in it no violation of any express limitation of the Constitution and we therefore declare it valid. (At 305).

Appellant does not now contend that his conduct did not violate the injunction. He argues belatedly only that Title II of the Civil Rights Act of 1964 is unconstitutional. But he raises no questions which have not been thoroughly explored and settled by this Court. *Heart of Atlanta Motel, Inc.* v. *United States,* 379 U. S. 241; *Katzenbach* v. *McClung, supra.*

CONCLUSION

For the foregoing reasons this appeal should be dismissed for want of jurisdiction or the lower court should be affirmed as its decision is manifestly correct and the appeal raises no substantial constitutional question which warrants further argument.

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